

SERVICE DATE - JUNE 22, 2000

SURFACE TRANSPORTATION BOARD

DECISION

STB Ex Parte No. 572 (Sub-No.1)

REMOVAL, REVISION, AND REDESIGNATION OF MISCELLANEOUS REGULATIONS

Decided: June 19, 2000

In a decision in this proceeding served on August 31, 1999, published in the Federal Register on September 1, 1999 (64 FR 47709), and effective on October 1, 1999 (August decision), the Board removed the regulations at 49 CFR part 1000, revised language from that part concerning indexing and making documents publicly available, and removed reference to publication of the Interstate Commerce Acts Annotated (ICAA).¹ We incorporated that revised rule into 49 CFR part 1001. We also removed unnecessary sections of 49 CFR part 1004, and updated the remaining sections in that part.

Joseph C. Szabo, for and on behalf of the United Transportation Union-Illinois Legislative Board (UTU-IL), filed a petition for reconsideration on September 20, 1999. UTU-IL objects to our new regulations at 49 CFR 1001.1(b),² claiming they would impose a hardship on railroad employees looking for precedents in processing complaints and other matters before the Board. It asserts at 3 (footnote omitted) that we “should delete proposed 1001.1(b).” It also criticizes two other aspects of our decision: the elimination of the regulations concerning the

¹ The ICAA is a digest that was issued beginning in 1930 and updated periodically. Summaries of the most significant decisions of the Interstate Commerce Commission (ICC) were grouped by subject matter and listed under the relevant sections of the Interstate Commerce Act.

² New section 1001.1(b) states:

(b) The following records, so-called “reading room” documents, are available for inspection and copying at the Board’s office:

(i) final decisions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(ii) those statements of policy and interpretations that have been adopted by the agency and are not published in the Federal Register;

(iii) administrative staff manuals and instructions to staff that affect a member of the public; and

(iv) copies of all records, regardless of form or format, that have been released to any person under 5 U.S.C. 552(a)(3) and that, because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records.

ICAA, and the finding that proper indexing is provided by the “Surface Transportation Board Daily Releases” (Daily Releases).³ Finally, UTU-IL criticizes our alleged failure to publish STB printed reports. We will deny the petition for reconsideration.

The substance of former part 1000 was originally adopted by the ICC on June 24, 1967 (32 FR 9020) (Ex Parte No. 37)⁴ in response to the passage of the Freedom of Information Act, 5 U.S.C. 552 (FOIA). Under the FOIA, government records are divided into three categories: (1) those required to be published in the Federal Register [section 552(a)(1)]; (2) those that must be made publicly available for inspection and copying and indexed -- the so-called “reading room” documents [section 552(a)(2)]; and (3) all others that are to be furnished upon request unless an exception applies [section 552(a)(3) and 552(b)]. FOIA required that three categories of reading room documents be made available and indexed: final decisions, including concurring and dissenting opinions, made in the adjudication of cases; statements of policy and interpretation adopted by the agency and not published in the Federal Register; and administrative staff manuals and instructions to staff that affect a member of the public. 5 U.S.C. 552(a)(2)(A), (B), and (C).⁵ As noted in the August decision, we revised, retained, and updated the part of former part 1000 that concerns making documents available and indexing, and incorporated that revised part into section 1001.1.⁶ We also formally removed the reference to the ICAA.

UTU-IL first claims that discontinuing the ICAA is contrary to a Senate resolution and agency practice, and that we did not give an adequate explanation for the discontinuance. UTU-IL argues that we gave no citations for the statement in our August decision at 2, n.2, that there are “many sources” for information about the laws of the Board. It contends that sources of

³ The indexing provisions are found at 49 CFR 1001.1(c) and (d).

⁴ The rules were originally codified at 49 CFR 100.

⁵ The Electronic Freedom of Information Act of 1996, Pub. L. No. 104-231, 110 Stat. 3049 (1996) (EFOIA), amended FOIA. Among other things, EFOIA added a fourth category of reading room documents: records released pursuant to a request under section 552(a)(3) that have become or are likely to become the subject of a subsequent request -- the so-called “subsequent request” documents [section 552(a)(2)(D)].

⁶ In proposing the deletion of section 1001.1(b) (which would eliminate the main regulatory reference to reading room documents), UTU-IL asserts at 3, n.2 that it “do[es] not concede the sufficiency of the criteria; for example, any requirements should extend to rulemaking as well as adjudication.” The language of section 1001.1(b) follows the requirements of the section 552(a)(2)(A) to make available “final decisions . . . made in the adjudication of cases. . . .” Nevertheless, the Board goes beyond this statutory requirement and makes available all decisions and notices in both adjudications and rulemaking proceedings in both the traditional reading room and the electronic reading room.

indexed information have actually diminished, noting that the ICC Practitioners Association has discontinued publishing the Consolidated Current Index to Decisions of the ICC.

We find that the formal elimination of the reference in the regulations to the publication of the ICAA is justified. As we noted in our August decision, the ICAA was originally published in conformance with a Senate Resolution, S. Res. 17, 70th Congress, 1st Sess, January 14, 1928. It has not been published in many years.⁷ We noted that, effective January 1, 1996, the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (ICCTA), abolished the ICC and created the Board. Section 204(a) of the ICCTA directed the Board to rescind all regulations established by the ICC that were based on provisions of law repealed and not substantively reenacted by the ICCTA. Although the Senate Resolution was not a law, we found that, because the ICC had been eliminated and the ICCTA failed to mention an annotated compendium of decisions under the laws administered by the Board, we were not legally obligated to resume publication of the long-defunct ICAA.

We believe that there are numerous sources for information about Board law. The Board maintains an Electronic Reading Room at its Internet website at www.stb.dot.gov that contains reading room documents created on or after November 1, 1996. These documents can be accessed by date, docket number, docket prefix or by key-word search term (the modern technological equivalent of a subject index). In addition, the Board has a traditional reading room that also contains these documents as well as pre-November 1, 1996 documents. These documents are available for inspection and copying from these sites. Commercial electronic legal research databases such as WESTLAW and LEXIS provide access to printed and unprinted ICC and Board decisions as far back as 1977 and 1965, respectively. The Government Printing Office has a website that has access to many databases, including the Code of Federal Regulations, the U.S. Code, and the Federal Register. In paper format, parties can use the Hawkins Index-Digest-Analysis of Decisions to locate both ICC and Board decisions by subject matter. The Board has limited resources, and given the alternative sources of information about Board regulatory activity, we see no need for an ICAA.

UTU-IL also asserts that the “Surface Transportation Board Daily Releases” (Daily Releases) do not provide satisfactory “indexing of subject matter,” but it provides no explanation for that assertion.

As noted, the four categories of reading room documents (final decisions, policy statements, staff manuals, and subsequent request documents) are required by FOIA to be indexed. Section 552(a)(2) provides inter alia that (1) the indexes give “identifying information

⁷ UTU-IL takes issue with our statement that 22 volumes of the ICAA were published until 1977. It asserts that we published paper form volumes 23 and 24 at least through the end of 1981. We understand that volume 22 was the last bound volume of the ICAA, but that the ICC issued advance bulletins that included annotations for about 3 or 4 years after that.

to the public” of the four types of documents; and (2) indexes are to be published and distributed quarterly or more frequently, unless such publication is “unnecessary and impracticable.”

As we noted in our August decision, under 5 U.S.C. 552(a)(2), the Board shall maintain an index that “provid[es] identifying information to the public as to any matter issued . . . and required . . . to be made available or published.” The statutory language provides no basis for concluding that an agency must create an elaborate indexing system.⁸ Thus, we found in our August decision at 3-4 (footnote omitted) that the Board’s issuance every business day of its Daily Releases satisfies the statutory indexing requirement.⁹

Each Daily Releases lists all the decisional documents issued by the Board (including documents required to be published in the Federal Register pursuant to section 552(a)(1)) as of 10:30 a.m. on that day. These documents are categorized by the decisional body that issues them (such as the entire Board, Director of the Office of Proceedings, Chief of the Section of Environmental Analysis, Secretary). Within each of these categories, the documents are further indexed in alpha-numeric order, by an alphabetical docket prefix (such as AB for abandonment-related matters, and FD for finance matters) and docket number. The title of the case, the date the matter was decided, and the document type (decision, notice, or environmental review, for example) are also provided. Finally, a brief summary of the content of the document is given.

We believe that the indexing we provide meets the statutory requirement that the agency “publish and distribute” the indexes on at least a quarterly basis, unless we find that such publication is “unnecessary and impracticable.” We stated in our August decision at 4 that, although not placed in bound volumes, we satisfy the publication and distribution requirement with “our practice of making all indexes conveniently available for inspection and copying and purchase. . . .” To the extent that the publication requirement could be interpreted to mandate bound volumes, our August decision found “it unnecessary and impracticable to publish and distribute the indexes.” Id.

Finally, UTU-IL argues that the Board’s practices and procedures for required indexing have been diminished by our failure to publish a single volume of our printed reports. Since the

⁸ For example, the Supreme Court has stated that “Congress has imposed some very limited record-creating obligations with regard to indexing under the FOIA.” Kissinger v. Reporters Committee, 445 U.S. 136, 152, n.17 (1980) (citation omitted). See also Irons & Sears v. Dann, 606 F.2d 1215, 1223 (D.C. Cir. 1979), cert. denied sub nom. Iron & Sears v. Commissioner of Patents & Trademark, 444 U.S. 1075 (1980), indicating only that an agency is to “provide[] a reasonable index. . . .”

⁹ The Board’s decisions are also indexed electronically.

filing of UTU-IL's petition, the Board has issued the first bound volume of the Surface Transportation Board Reports, which is also available on our website. We are preparing a second bound volume, which will be published in the near future. Nevertheless, all decisions, including every decision that will appear in future bound volumes, are available to the public. These decisions are listed and briefly summarized in the Daily Releases, which indicates how copies of these documents can be purchased. The decisions and indexing information are also available on our website.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for reconsideration is denied.
2. This decision is effective July 22, 2000.

By the Board, Chairman Morgan, Vice Chairman Burkes, and Commissioner Clyburn.

Vernon A. Williams
Secretary